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Discovery in Libel Cases Involving Confidential Sources and Non-Confidential Information

Jane E. Kirtley*

I. Introduction

The question of what type of information plaintiffs should be able to acquire during discovery in a libel suit involving the news media has been a source of tension for many years. Plaintiffs contend that access to news organizations' editorial processes and confidential sources is imperative to meet their burden of proof,[1] particularly when actual malice must be demonstrated.[2] The news media argue that access to the editorial process will chill the internal discussion of stories, since anything said can be discovered and admitted in trial.[3] A result of this decreased discussion might be erroneous reporting because some inaccuracies could go unchallenged.[4] Simi-

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1. *See* Herbert v. Lando, 441 U.S. 153 (1979) (libel plaintiffs should have access to all non-confidential, non-published information); Downing v. Monitor Publishing Co., 120 N.H. 383, 415 A.2d 683 (1980) (news organizations must disclose the identity of confidential sources to libel plaintiffs after the plaintiff makes an offer of proof regarding validity of the claim).

2. Herbert v. Lando, 441 U.S. 153, 169-70 (1979). *See infra* note 31-68 and accompanying text for an examination of *Herbert*; *see also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *Sullivan* defines actual malice as a published statement that is either known to be false by the publisher at the time of communication, or is made in reckless disregard for the truth. *Id.* at 279-80. Public officials are required to prove actual malice in order to prevail in a libel suit. *Id.* The Court has extended this requirement to public figures. *See, e.g.*, Gertz v. Welch, Inc. 418 U.S. 323, 342 (1974).

3. Herbert v. Lando, 441 U.S. 153, 171 (1979).

4. *Id.* at 173-74. The editorial process is a microcosm of the Holmesian marketplace of ideas, where the accuracy of a story is tested by discussing all available information. Requiring disclosure damages this marketplace because editors and news organization attorneys will warn against candid, forceful discussion of stories if such statements may be used against the organization in a libel action. *See generally* Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985), *reh'g granted, vacated in part*, 763 F.2d 1472 (D.C. Cir. 1985). In *Tavoulareas*, the *Washington Post* published a story stating that the president of Mobil Oil, William Tavoulareas, used his influence to set up his son Peter in the shipping business. During discovery,

larly, the media assert that the identity of confidential sources should be protected so as not to deter future sources from disclosing information.[5] If access to confidential news sources is inhibited, it is argued that public access to information will be reduced.[6]

The United States Supreme Court has not been silent on these issues. In *Herbert v. Lando*,[7] the Court refused to grant protection to news organizations' editorial processes, holding that a libel plaintiff must be allowed to explore editorial decisions, including the state of mind of reporters and editors, through the discovery process.[8] In *Branzburg v. Hayes*,[9] the Court, in a criminal setting,[10] required three reporters to disclose the identity of confidential sources before a federal grand jury,[11] rejecting the concern that disclosure would deter future sources from coming forward.[12] While four justices limited their holding specifically to federal grant juries,[13] five justices, applying two standards,[14] recognized the existence of some type of reporter's privilege.

Both cases involved the need for information directly related to the heart of the claim.[15] In *Branzburg*, reporters knew the identity of people who might have committed a crime.[16] The purpose of the grand jury proceedings was to determine if criminal charges should be filed against those individuals.[17] The information, therefore, was

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Tavoulareas learned that a *Post* copy editor had written a memo stating that the story was difficult to believe, although the editor did not have the full information possessed by the reporter. Tavoulareas used the memo at trial, arguing it demonstrated that the *Post* entertained serious doubts about the truth of the story before it was published. *Tavoulareas*, 759 F.2d at 114-17. The *Post*, however, argued that the copy editor's statement was uninformed hyperbole. *Id.*

5. *See* Branzburg v. Hayes, 408 U.S. 665, 679-81 (1972).

6. *Id.* The Court declined to follow that reasoning and questioned the legitimacy of the idea. *Id.* at 690-91.

7. 441 U.S. 153 (1979).

8. *Id.* at 172-74.

9. 408 U.S. 665 (1972).

10. *See infra* notes 128-34 and accompanying text for a discussion of the differences between criminal and civil cases when the identity of a confidential source is sought.

11. *Branzburg*, 408 U.S. at 668-80, 708-09.

12. *Id.* at 681-83.

13. *Id.* at 667-709 (Justice White, joined by Chief Justice Burger, and Justices Blackmun and Rehnquist).

14. *See infra* notes 122-27 and accompanying text for an examination of the various *Branzburg* opinions.

15. "Heart of the claim" is one standard of review used by courts to determine whether to order discovery in both non-confidential, non-published information cases and confidential source cases. *See infra* notes 87-93 and 148-55 and accompanying text. The Court did not explicitly adopt that standard.

16. *See Branzburg*, 408 U.S. at 668-80. One reporter was allowed to photograph the production of hashish on the condition that the substance's manufacturer remain anonymous. *Id.* at 667-68. A second reporter gained access to the headquarters of the Black Panthers on the condition that he would not disclose anything he saw or heard. *Id.* at 672. A third also had information about the Black Panthers obtained on a similar condition. *Id.* at 675-79.

17. *Id.* at 687-92. In *Branzburg*, the Court said the grand jury has a dual function of determining if there is probable cause to believe that a crime has been committed and of

directly related to the purpose of the proceedings. In *Herbert*, a libel case, the plaintiff needed certain information to prove his claim.[18] The state of mind of the reporters and editors involved was crucial to the success of his action.[19] The information, once again, was directly related to the purpose of the proceedings.

Since *Herbert*, however, a new type of libel suit has developed. The primary purpose of this action is to harass and intimidate the media, rather than to seek compensation for damage to reputation, historically the central purpose of a libel action.[20]

The new type of libel plaintiff, upon learning that publication of a story is imminent, seeks to inhibit dissemination by writing a letter threatening a libel suit,[21] often without regard to the veracity of the story.[22] Even the threat of a suit forces the news organization to decide whether to allocate financial resources to defend the suit or to capitulate to the threat by declining to publish or by altering story content.[23] Since a significant portion of defense costs relate to discov-

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protecting citizens against unfounded criminal prosecutions. *Id.* at 686-87.

18. *See infra* notes 31-49 and accompanying text for an examination of the *Herbert* majority opinion.

19. *Herbert*, 441 U.S. at 170-73.

20. In *Herbert*, the Court, quoting Justice Oliver Wendell Holmes, wrote: "If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable, if the statements are false or are true only of some one else." *Id.* (quoting Peck v. Tribune Co., 214 U.S. 185, 189 (1909)).

21. *See* Abrams, *Why We Should Change The Libel Law*, New York Times, Sept. 29, 1985, § 6 (magazine) at 34. Abrams offers a textbook example of the impact of a threatening letter on publication. Two scientists attempted to publish a study concerning alleged ethical breaches by several prominent scientists. *Id.* at 87, 90. Publishers reportedly refused to publish the study not because the truth of the study was in question, but because the publishers received several letters threatening libel suits if the study was published. *Id.* at 90. The publishers feared the cost of defending the suit. *Id. See also* Laxalt v. McClatchy, No. CV-R-84-407 (D. Nev. Sept. 21, 1984). In that case, Senator Paul Laxalt filed a 250 million dollar libel suit against McClatchy newspapers for a story stating that a casino owned by Laxalt skimmed profits, and that Laxalt supporters had connections with organized crime. Washington Post, Jan. 3, 1986, at A1, col. 4. Before McClatchy published the stories, both ABC and CBS were considering broadcasting similar reports. Wall St. J., Sept. 28, 1984 at 56, col. 1. Both declined, however, after Laxalt's attorney wrote letters to both networks questioning the reliability of a source. Although news executives for the networks claimed the stories were not aired for editorial reasons, two unidentified ABC employees said the stories were pulled because of the letter from Laxalt's lawyer. *Id.*

22. In Olsen v. Allen, No. 84-2-10811-8 (Wash. Super. Ct. King Co. filed July 30, 1984), author Jack Olsen alleged that attorneys for the subjects of his book, *Son: A Psychopath and His Victims*, wrote a letter threatening a libel suit against THE LADIES HOME JOURNAL if the magazine published excerpts of the book. *Olsen*, Complaint for Damages at 3. Olsen charged that the attorneys had read neither a manuscript of the book nor the excerpts. *Olsen*, Complaint for Damages at 3. Olsen contended that the magazine had agreed to publish excerpts of the book before the letter was written, but that after receiving the letter the magazine decided not to publish. *Olsen*, Complaint for Damages at 2-3.

23. The average cost of defending a libel suit is estimated to be $150,000. Baer, THE AM. LAW., Nov. 1985, at 69. It has also been estimated that CBS spent seven to eight million dollars defending the *Westmoreland* suit, and that Time, Inc. spent five to seven million dollars defending the *Sharon* suit. *Id.* The high cost of defending libel suits has a particular impact on small news organizations with few assets. *See infra* note 26.

ery,[24] an exhaustive round of discovery may make the cost of defense prohibitive.[25] In many instances, the decision to publish is based on the financial position of the news organization and not the accuracy and importance of the story.[26]

More problems arise if a party actually brings a libel suit, because compliance with discovery requests generally disrupts the news gathering process.[27] Staff depositions are time consuming, and discovery requests concerning information held by reporters and editors require staff time to dig through notes, papers, and photos to find the information requested.[28] The problem is particularly acute for smaller news organizations with few staff members.[29] Obviously, if a news organization is forced to allocate a significant part of its staff in compliance with discovery requests, the primary purpose of the news organization—to inform the public—will be hampered.

Another related problem rests in determining the appropriate scope of discovery when an opponent attempts to probe a reporter's confidential sources. If a reporter has used confidential information, the plaintiff may request the name of the source. Indeed, some plaintiffs bring actions simply to identify an informant rather than to seek compensation for a damaged reputation.[30] If sources cannot hide behind the cloak of confidentiality, they will be less likely to come forward with information.

The public interest demands that the news media should be protected from discovery in libel litigation that is designed to harass the

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24. *Herbert*, 441 U.S. at 176.

25. Most news organizations cannot afford extensive discovery similar to that used by attorneys representing CBS in the *Westmoreland* case. *See* Baer, THE AM. LAW., Nov. 1985, at 69. The attorneys in that case had an estimated 35 pounds of indices and 300,000 documents. Baer, *supra* note 23, at 69.

26. A weekly newspaper in Iowa published a retraction to appease a disgruntled individual who had been the subject of a story, even though the paper knew the story was true. The paper was forced to retract because the $10,000 deductible in the paper's libel insurance policy would have bankrupted the newspaper. *News Notes*, 12 MEDIA L. REP. BNA No. 1 at 3 (Oct. 1, 1985).

27. *See Herbert*, 441 U.S. at 176 n.25. In *Herbert*, the Court recognized the problem for small news organizations, but provided no protection for them. *Id.*

28. The *Herbert* Court also recognized the impact of discovery on the news gathering process but, again, did nothing to address the issue. *Id.*

29. In *Herbert*, the CBS producer's deposition continued intermittently for more than a year, filling 26 volumes containing nearly 3,000 pages and 240 exhibits. *Id.*

30. Although most states' "shield laws" (which insulate reporters from being compelled to disclose sources of information) apply to defendants in defamation cases, a few states specifically exempt libel and slander defendants. *See* OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-44.540 (1977); R.I. GEN. LAWS §§ 9-19.1-1-9-19.1-3 (1985); TENN. CODE ANN. § 24-1-208 (1980). Following the jailing of reporter Richard Hargraves for refusing to reveal a source in a libel case, *see infra* note 193, the Illinois shield law was amended specifically to include libel. ILL. ANN. STAT. ch. 110, §§ 8-901, 8-902, 8-904, 8-907 (Smith-Hurd 1984) *amended by* H.B. 508, *enacted* Sept. 16, 1985. The U.S. Court of Appeals for the Third Circuit recently affirmed the constitutionality of Pennsylvania's shield law in libel cases. Coughlin v. Westinghouse Broadcasting and Cable, Inc., 780 F.2d 340 (3d Cir. 1985).

defendant or his sources. Standards must be developed to determine both the legitimacy of the claim and the necessity of obtaining information. Yet plaintiffs with legitimate claims must have access to information necessary to meet their burden of proof. This article will examine recently developed judicial methods designed to balance the competing interests of the news media and plaintiffs in libel litigation. In so doing, the rationales of *Herbert*, *Branzburg*, and other relevant opinions will be explored.

II. The Discovery of Non-Confidential, Non-Published Information

A. The Seminal Case: An Examination of Herbert v. Lando

In *Herbert v. Lando*,[31] the United States Supreme Court held that libel plaintiffs must have access to news organizations' decision making processes, including information about the state of mind of reporters and editors.[32] The case developed when a producer for the CBS news program "60 Minutes" refused to answer questions about his thoughts and opinions concerning a story he produced.[33] CBS claimed a first amendment privilege, arguing that exposing the editorial process to discovery would chill candid discussion between editors and reporters concerning story veracity.[34] Since inaccuracies may be ferreted out through discussion, CBS argued that decreased discussion leads to increased inaccuracies, thereby injuring the public interest in access to accurate information.[35]

The Court, however, rejected the claim, stating that the privilege would upset the balance struck in *New York Times v. Sullivan*,[36] between the public interest in access to information concerning public officials and figures, and the individual interest in seeking compensation for damage to reputation.[37] The Court said that recognition of a privilege would substantially interfere with the plaintiff's ability to prove actual malice,[38] which requires proof that the news organization either knew the information was false at the time of publication, or acted in reckless disregard for the truth.[39] The actual malice standard requires an examination of the publisher's state of

31. 441 U.S. 153 (1979).
32. *Id.* at 169-70.
33. *Id.* at 157. The case arose when "60 Minutes" broadcast a story concerning charges made by retired Army officer Anthony Herbert that his superior officers covered up reports of atrocities and other war crimes. *Id.* at 155-56. Herbert alleged that the article falsely and maliciously portrayed him as a liar and a person who had made war crimes charges to explain why he was relieved of his command. *Id.* at 156.
34. *Id.* at 173-75.
35. *Id.* at 194 (Brennan, J., dissenting in part).
36. 376 U.S. 254 (1964).
37. *Herbert*, 441 U.S. at 169-72.
38. *Id.* at 170.
39. *Sullivan*, 376 U.S. at 280.

mind.[40] Excluding editors and reporters from the examination removes a key source of information and may establish an impenetrable barrier to the success of a plaintiff's claim.[41]

The Court also found the outer boundaries of the privilege difficult to discern.[42] CBS said that Lando would answer queries concerning his knowledge, but would not answer questions concerning his beliefs.[43] The Court, however, could discern no distinction between the two.[44]

The Court also rejected the argument that giving a plaintiff access to the editorial process would chill communication within news organizations.[45] The Court acknowledged that although access would have a chilling effect, only that speech not protected by *Sullivan* would be threatened.[46] Additionally, while the Court recognized that there is a correlation between increased discovery costs and the cost of litigation,[47] it said that increases in litigation costs are not peculiar to libel and slander cases.[48] The Court reasoned that district courts may control the costs of litigating libel and slander suits by strictly applying the relevance requirements of the Federal Rules of Civil Procedure.[49] Accordingly, the Court held that existing safeguards adequately protected the public interest in access to information.

Justice Powell's separate concurrence expanded the discussion of discovery costs.[50] He admonished district court judges against allowing uncontrolled discovery, particularly where first amendment rights are involved,[51] and stated that judges should determine the discoverability of information through the relevance standard.[52] Relevance itself should be determined by balancing the public's informational interest against the plaintiff's need for information.[53]

The dissenting justices, however, were concerned with the chilling effect discovery would have on news organizations' decision-making processes. Justices Brennan and Marshall said a privilege should be provided.[54] They agreed that the scope of the privilege

40. *Herbert*, 441 U.S. at 170.
41. *Id.*
42. *Id.*
43. *Id.* at 170-71.
44. *Id.*
45. *Id.* at 171.
46. *Id.* at 172-73.
47. *Id.* at 176.
48. *Id.*
49. *Id.* at 176-77; *see* FED. R. CIV. P. 26(b)(1) and 26 (c).
50. *Id.* at 179 (Powell, J., concurring).
51. *Id.* at 180.
52. *Id.* at 179-80.
53. *Id.*
54. *See Herbert*, 441 U.S. at 181 (Brennan, J., dissenting in part), 206 (Marshall, J.,

should include deliberative and policy making processes while excluding factual material.[55]

The two justices disagreed, however, about how much protection to provide. Justice Brennan argued that the Constitution demands a qualified privilege.[56] He believed that a news organization's decision making process should be privileged against discovery until the plaintiff establishes a prima facie case of defamatory falsehood.[57] Brennan argued that a qualified privilege strikes the proper balance between protecting newsroom discussion, which enhances the accuracy of information,[58] and providing the plaintiff with the necessary information to meet his burden of proof.[59]

Justice Marshall, in his dissenting opinion, argued for an absolute privilege. He stated that "shielding this limited category of evidence from disclosure would be unlikely to preclude recovery by plaintiffs with valid defamation claims."[60] Both dissenters, accordingly, would have provided some type of protection to the news media.

Although all of the opinions claim to offer some type of protection to news organizations, none of the expressed standards sufficiently protect the public interest in access to information. The scope of the protection recognized in *Herbert* is limited to the editorial process, which is a small part of the news gathering process.[61] Under *Herbert*, extensive discovery will still inhibit reporters by requiring them to take the time to comply with plaintiff requests, instead of spending their working hours gathering information.[62] Each opinion in *Herbert* dictates that material not involved with the editorial process is discoverable upon a very broad showing of relevance.[63] A significant demonstration of need by the plaintiff is not required.

Although *Herbert* provides a very limited requirement concerning proof of need by the plaintiff, the decision requires no demonstration whatsoever that a libel claim has merit, and has not been brought merely to harass, retaliate or achieve source disclosure.[64] Only Justice Marshall did not presume that a plaintiff's purpose in

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dissenting).

55. *See id.* at 181, 208-10.

56. *Id.* at 181.

57. *Id.* Although Justice Brennan did not define defamatory falsehood, he stated that the prima facie showing could be made as part of a motion for an order compelling discovery, or at any other appropriate time. *Id.* at 198 n.17.

58. *Id.* at 197.

59. *Id.*

60. *Id.* at 209-10.

61. Justice Brennan defined the editorial process as "predecisional communication among editors." *Id.* at 181.

62. *See supra* notes 27-29 and accompanying text.

63. *See supra* note 55 and accompanying text.

64. None of the opinions would require such a demonstration.

bringing suit is to seek compensation for damage to reputation.[65] None of the opinions provide adequate protection against litigational threats designed to harass and intimidate, and which force news organizations to decide between incurring the risk and expense of defending a costly suit and dropping the news story. The Court's position that *Sullivan's* actual malice standard provides adequate protection for the press[66] is little comfort to a publisher or broadcaster who cannot afford to pay.[67] If a publisher cannot pay the costs of defending a threatened suit, *Sullivan* provides no protection. The suit itself chills speech.[68]

Since the *Herbert* majority rationale provides inadequate protection for news organizations, how can protection of non-confidential, non-published information be accomplished? A standard must be developed to protect the news media from plaintiff discovery that inhibits the dissemination of information, while permitting plaintiff access to relevant information when a legitimate claim exists. The remaining discussion in this section will review lower court decisions considering the appropriate level of protection to be accorded this type of information.

B. Libel Discovery Concerning Non-Confidential Information Following Herbert

Since *Herbert*, a number of courts have formulated standards to determine whether libel plaintiffs may discover non-confidential, non-published information from a news organization defendant.

1. Broad readings of Herbert.—A few courts have read *Herbert* broadly, erecting few barriers to information discoverable by libel plaintiffs.[69] The broadest reading is *Gleichenhaus v. Carlyle*,[70] in which the Kansas Supreme Court reversed a trial court determina-

65. Justice Marshall identified ulterior motives, stating: "Given the circumstances under which libel actions arise, plaintiff's pretrial maneuvers may be fashioned more with an eye to deterrence or retaliation than to unearthing germane material." *Herbert*, 441 U.S. at 204-05 (Marshall, J., dissenting). Although Justice Marshall's opinion provides limited protection, it is ineffective to inhibit non-meritorious claims, since it covers only the very narrow area of the editorial process. The opinion provides no protection in other areas, such as the discovery of non-published factual material, where plaintiffs may retaliate via the discovery process by running up their opponent's attorney's bill.

66. *Id.* at 170-74.

67. *See supra* note 26 and accompanying text.

68. *See* Abrams, *supra* note 21. Abrams reports one editor said that it had been " 'sobering to look' at the 'clear and convincing report,' but that 'we see no feasible way to use it' because 'both our publisher and our long-time legal adviser believe that the legal costs incurred would be prohibitive.' " *Id.* at 90.

69. *See* Central New Jersey Jewish Home for the Aged v. New York Times, Co., 183 N.J. Super. 445, 444 A.2d 80 (1981), and Greenleigh Assoc.s, Inc. v. New York Post Corp., 79 A.D.2d 588, 434 N.Y.S.2d 388 (N.Y. App. Div. 1980).

70. 226 Kan. 167, 597 P.2d 611 (1979).

tion that information sought by a plaintiff was not relevant.[71] The court said a trial judge should grant a discovery request "if there is *any possibility* that the information sought *may* be relevant to the subject matter at hand."[72] The court believed that this breadth of discovery was necessary to provide the parties with information essential to litigation.[73]

The *Carlyle* standard, however, falls short of the requirements set out in *Herbert*. Unlike *Herbert*, *Carlyle* does not require a showing of clear relevance.[74] Instead, the *Carlyle* court permits discovery if any possibility exists that the desired information may be relevant.[75] The Kansas court distinguished the *Herbert* standard on its facts, stating that it had "no quarrel with the [*Herbert*] rule; however, its application to the case at the bar would be misplaced."[76] The court, however, failed to explain clearly why the *Herbert* rule should not be applied.[77] Since the *Carlyle* court failed to apply the Supreme Court's relevancy requirements, and offered no similar safeguards, *Carlyle* provides less discovery protection for the news media than *Herbert*.

The *Carlyle* standard, then, is even more detrimental to the public interest than *Herbert* because it places virtually no burden on the plaintiff to demonstrate need. Almost any type of information could conceivably be relevant to a plaintiff's case. The standard also requires no proof of plaintiff's good faith. Any plaintiff who states a prima facie case has access to the broadest information available. The net result is that a plaintiff may harass a news organization through a libel suit by requiring broad discovery, even if the claim is illegitimate and the need for the information is negligible.

2. *The Sliding Scale of Materiality.*—In *Continental Cablevi-*

71. *Carlyle*, 226 Kan. at 170-71, 597 P.2d at 614.

72. *Id.* at 170, 597 P.2d at 614 (emphasis added).

73. *Id.* at 170-71, 597 P.2d at 614.

74. It is difficult to discern whether the *Herbert* Court, in requiring the strict application of relevance, intended to derive the standard from the first amendment or the FEDERAL RULES OF CIVIL PROCEDURE. *See Herbert*, 441 U.S. at 177. The distinction is important. If the first amendment requires strict application of relevance, the standard is binding on the states. If the requirement is an instruction on application of the FEDERAL RULES, the standard would only be binding on the federal courts, and states would be free to set standards below its strict application. The Kansas court therefore may be constitutionally permitted to establish the lower standard if the Court only intended the standard to be an interpretation of the FEDERAL RULES. In addition, in neither Central New Jersey Jewish Home for the Aged v. New York Times, Co., 183 N.J. Super. 445, 444 A.2d 80 (1981), nor Greenleigh Assoc.s, Inc. v. New York Post Corp., 79 A.D.2d 588, 434 N.Y.S.2d 388 (N.Y. App. Div. 1980) does the respective court define what constitutes relevant evidence. It is therefore impossible to determine whether these cases fall within *Herbert*.

75. *Carlyle*, 226 Kan. at 170-71, 597 P.2d at 614.

76. *Id.* at 170, 597 P.2d at 614.

77. *Id.*

sion v. Storer Broadcasting,[78] the United States District Court for the Eastern District of Missouri denied a newspaper's motion to quash a deposition subpoena,[79] but recognized the detrimental effect of discovery on the news process.[80] Accordingly, the court established a standard that protects non-confidential information unless it is relevant and otherwise unavailable.[81] Insofar as the standard requires a demonstration of relevance, it is similar to the *Herbert* standard. But the *Continental Cable* standard defines relevance differently, requiring a demonstration of material need. Thus, non-confidential information is better protected under *Continental Cable* than under *Herbert*. But the *Continental Cable* court gave no guidelines explaining what "material need" might encompass.[82]

Another protective feature of the *Continental Cable* standard is that it requires a demonstration that the information is not otherwise available.[83] This is known as the alternative source rule. This rule has the salutary effect of relieving some of the burden placed on news organizations during discovery by forcing plaintiffs to seek information from other sources first.[84]

Even though it uses different language, the *Continental Cable* standard is consistent with the policy expressed in *Herbert*. The *Herbert* relevance requirement is intended to inhibit annoying, embarrassing, or oppressive discovery.[85] The material need requirement of *Continental Cable* likewise implements that policy, although in a stronger way, by forcing plaintiffs to show exactly how the information sought relates to the case. Although *Continental Cable* requires that information be sought from alternative sources initially, the provision does not conflict with the *Herbert* policy of allowing plaintiffs to have access to information if they truly need it.[86]

Although the *Continental Cable* test provides additional protection, its provisions are by no means perfect. While some demonstration of need is required, the standard fails to protect information that is related only tangentially to a case. Information may be "material," but that alone does not mean it is of central importance to a

78. 583 F. Supp. 427 (E.D. Mo. 1984).

79. *Id.* at 438.

80. *Id.* at 434-35. The court said: "The first amendment interest in preserving the vitality of the press is implicated any time civil litigants seek discovery or testimony from the media, regardless of whether confidential or non-confidential sources or materials are sought." *Id.* at 434.

81. *Id.* at 435.

82. *Id.* at 434.

83. *Id.* at 435.

84. The alternative source rule is usually applied in confidential source cases. *See infra* notes 161-63 and accompanying text.

85. *Herbert*, 441 U.S. at 177.

86. *Continental Cable*, 583 F. Supp. at 435.

plaintiff's case. The information sought may not be of sufficient importance to justify interference with the news gathering process by requiring a news organization to take the time to comply with the discovery demand. And, like *Herbert*, *Continental Cable* also fails to require proof of the legitimacy of the claim prior to discovery. Accordingly, the costs of defense could, still, in terms of money and potential chilling effect, adversely affect the dissemination of news.

3. Permitting Discovery When the Information Sought is of "Central Importance" to Plaintiff's Case.—In *Marchiondo v. Brown*,[87] the New Mexico Supreme Court adopted a test that provides better media protection. The court held that information in the exclusive possession of the defendant is discoverable if it is of central importance to the plaintiff's case.[88] Information is of central importance if refusing discovery would unduly prejudice the plaintiff's action.[89]

Unfortunately, the decision does not state why the central importance standard is appropriate. The court merely cites passages from *Herbert*, states that the plaintiff in *Marchiondo* should have access to information held exclusively by the defendant, and recites that the information sought is of central importance.[90] Despite the lack of explanation by the court, an examination of the standard demonstrates that it effectively accommodates competing interests. The "central importance" requirement limits the scope of discovery, striking a balance between the competing interests of allowing plaintiff access and limiting inconvenience to the news organization.[91]

The standard can potentially provide more protection than required by *Herbert*. *Herbert* merely requires the strict application of the relevance standard,[92] and relevance, in the context of discovery, is broadly interpreted.[93] *Marchiondo* significantly narrows the scope of discoverable evidence, precluding inquiry unless exclusion would unduly prejudice plaintiff's case.[94] Some relevant evidence, therefore,

87. 98 N.M. 394, 649 P.2d 462 (1982).

88. *Marchiondo*, 98 N.M. at ____, 649 P.2d at 467; *see* Williams v. American Broadcasting Co, 96 F.R.D. 658 (W.D. Ark. 1983). In *Williams*, the court required plaintiff to prove that the information was needed to prove a critical element of the case before it ordered discovery. *Williams*, 96 F.R.D. at 668-70.

89. *See* Mize v. McGraw Hill, Inc., 82 F.R.D. 475, 477-78 (S.D. Tex. 1979).

90. *Marchiondo*, 98 N.M. at ____, 649 P.2d at 467. Plaintiff was seeking to discover the party responsible for writing a headline and using a photo of him as part of a story discussing the infiltration of organized crime in New Mexico. *Id.* at ____, 649 P.2d at 465. Plaintiff said he needed to know who made the decision in order to determine whether the publication was made with actual malice. *Id.*

91. *See supra* note 89 and accompanying text.

92. *Herbert*, 441 U.S. at 177.

93. *Id.*; *see Carlyle*, 226 Kan. at 170-71, 597 P.2d at 614.

94. *See supra* note 89 and accompanying text.

is not discoverable under *Marchiondo* although it would be discoverable under *Herbert*.

Marchiondo also provides more protection than the material need standard of *Continental Cable* because information that is materially needed will in most cases exceed information which, if excluded, would unduly prejudice plaintiff's case. But *Continental Cable's* alternative source rule exceeds *Marchiondo* because *Marchiondo* requires no proof of attempts to obtain the information through alternative sources. As with *Herbert* and *Continental Cable*, *Marchiondo* does not examine the nature of the claim to determine its legitimacy. News organizations may, therefore, still be harassed by illegitimate claims, although the scope of harassment is decreased.

4. Permitting Broad Discovery After a Determination of the Merit of a Claim.—The preceding standards, while providing different levels of review, are similar in focus in that they are concerned with the type of information sought. All of these approaches fail to examine the need for discovery from the opposite point of view — whether or not the claim itself is legitimate. In *McBride v. Dow*,[95] the D.C. Circuit held that trial courts should determine whether a claim has merit before allowing broad discovery.[96] Until such a determination is made, discovery is to be limited, where feasible, only to information that may sustain a summary judgment.[97] The *McBride* court reasoned that this preliminary evaluation of the merits may inhibit suits brought to harass rather than to seek compensation for reputational damage.[98] *McBride* also evidences an interest in promoting judicial economy because it provides a mechanism to permit plaintiffs to conduct discovery for the limited purpose of allowing a determination of whether summary judgment is appropriate.[99]

The D.C. Circuit's decision at first appears to fall within the dictates of the *Herbert* majority and the Powell concurrence,[100] but in fact significantly deviates from *Herbert's* focus. *Herbert* does not address the nature or motivation of the claim.[101] Rather, it addresses the scope of discovery during the claim and presumes, without ex-

95. 717 F.2d 1460 (D.C. Cir. 1983).
96. McBride v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d at 1467.
97. *Id.*
98. *Id.* at 1461. Judge Bork, writing for Judges Wright and McKinnon, said: "The ability to frame a pleading that defeats, however narrowly, a motion to dismiss ought not to be converted into a license to harass. We suggest, therefore, that the district court proceed upon remand in a manner that will minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." *Id.* at 1461-62.
99. *Id.* at 1467.
100. *Id.*
101. *See supra* notes 64-65 and accompanying text.

plicitly stating, that the claim has some merit.[102] By allowing discovery only after proof of merit,[103] the D.C. Circuit opinion leans closer to Brennan's dissent in *Herbert*,[104] which would require a prima facie showing of defamatory falsehood before allowing discovery regarding the editorial process of the news organization.[105] Yet, Brennan's dissent further limits the type of allowable discovery. It would make available only the editorial discussion of the allegedly defamatory information,[106] while factual material would be discoverable without the prima facie showing.[107] The D.C. Circuit's approach specifically limits discovery to information that may sustain a determination of summary judgment prior to an assessment of the merits of the claim.

Although *McBride* gives more protection at the initial stage than Brennan's approach, it fails to provide protection for defendants after merit is demonstrated. The court permits broad discovery, but requires no showing of need for information by the plaintiff.[108] Plaintiffs may therefore disrupt the news dissemination process through extensive discovery even if there is little need for the information or if the information may be obtained from other sources.

C. *Balancing Competing Interests*

Libel actions entail a clash of competing interests. Because actual malice under *Sullivan* requires proof of a particular state of mind, public figure and public official plaintiffs must have access to the decision-making process of the news media.[109] Fairness also requires that plaintiffs have access to factual information important to their case.[110] But since unrestricted access to non-confidential, non-published information can disrupt and chill the dissemination of information,[111] courts have been struggling with formulating an appropriate standard to accommodate these competing interests. Unfortunately, none of the standards formulated in *Herbert*, *Continental Cable*, *Marchiondo*, and *McBride*, standing alone, sufficiently strike a balance. A combination of the standards developed in these cases, however, would appropriately balance the interests involved.

A court should first make a threshold determination to see if the

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102. *Herbert*, 441 U.S. at 155.
103. *McBride*, 717 F.2d at 1467.
104. *Herbert*, 441 U.S. at 180-99 (Brennan, J., dissenting in part).
105. *Id.* at 197.
106. *Id.* at 181.
107. *Id.*
108. *McBride*, 717 F.2d at 1467.
109. *See* Herbert v. Lando, 441 U.S. 153 (1979).
110. *Id.*
111. *See supra* notes 20-29 and accompanying text.

claim before it has merit.[112] The *McBride* approach provides sufficient protection in this area. It allows sufficient discovery to determine whether summary judgment is appropriate.[113] At the same time, meritless suits can be winnowed out, decreasing defense costs while lessening the inhibitory effect that libel litigation has on news dissemination.

After the merits of the claim have been determined, the plaintiff's need for information should be considered. First, a court should determine whether the information goes to the heart of the plaintiff's claim.[114] Second, plaintiffs must demonstrate that the information is not reasonably available from other sources.[115] These standards decrease the time and expense to news organizations, while still allowing plaintiffs access to information necessary to their claim.

III. The Discovery of Confidential Sources in a Libel Suit

It is often necessary for a reporter working on a sensitive story to gather information from confidential sources.[116] The confidential source provides information to the reporter on the condition that the source not be identified.[117] In many instances, the only way to get information is to promise confidentiality.[118] It is understandable that news organizations prefer not to disclose confidential sources when their reporters have promised confidentiality, because disclosure, without authorization from the source, may inhibit the future use of this method of gathering information.[119] The public's interest in access to information would therefore be adversely affected by compelled disclosure of confidential sources.[120]

Competing interests, however, may require disclosure. For instance, the plaintiff may argue that the identity of a source may be necessary to establish that published information is true or to evaluate the reliability of the source.[121] This section will examine these competing interests and will determine what type of protection should be offered to confidential sources in the libel setting.

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112. *See McBride*, 717 F.2d 1460; *see also supra* notes 95-108 and accompanying text.
113. *McBride*, 717 F.2d at 1467.
114. *See Marchiondo*, 98 N.M. at ____, 649 P.2d at 467.
115. *See Continental Cable*, 583 F. Supp. at 434.
116. Mitchell v. Superior Court, 37 Cal.3d 268, ____, 690 P.2d 625, 628, 208 Cal. Rptr. 152, 155 (1984).
117. Branzburg v. Hayes, 408 U.S. 665, 694 (1972).
118. *Mitchell*, 37 Cal.3d at ____, 690 P.2d at 628, 208 Cal. Rptr. at 155.
119. Zerilli v. Smith, 656 F.2d 705, 710-11 (D.C. Cir. 1981).
120. *Id.*
121. *Id.* at 714.

A. Protection of Confidential Sources Generally: A United States Supreme Court View

In *Branzburg v. Hayes*,[122] the United States Supreme Court rejected the concept of a reporter's privilege in a federal grand jury setting.[123] The Court, however, was divided. Justice White, writing for three other justices, found no privilege in a grand jury setting.[124] He did not consider whether a privilege might exist in different circumstances.[125] Justice Powell concurred in the holding ordering disclosure, stating that disclosure could be compelled if the source of the information was relevant to a criminal investigation.[126]

Justice Stewart, writing for two other justices, dissented, stating that a reporter can only be required to disclose the identity of a source if three factors are established: 1) probable cause to believe that the reporter has information that is clearly relevant to a specific probable violation of law; 2) the information sought cannot be obtained by alternative means less destructive of first amendment rights; and 3) a compelling interest that requires disclosure.[127]

All of the opinions in *Branzburg* were limited to examination of the issue of disclosing a confidential source in a criminal setting.[128] The public has a strong interest in ensuring that criminal activity is punished.[129] The public, however, also has an interest in access to information, which would tend to preclude disclosure of confidential sources.[130] The question of a reporter's privilege in a criminal setting would therefore place two distinct public interests at odds.[131] After weighing these interests, the *Branzburg* Court struck a balance in favor of law enforcement and ordered disclosure.[132]

Whether *Branzburg* applies in a civil context is unclear. In a libel setting, no such societal interest favors disclosure because an

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122. 408 U.S. 665 (1972).

123. *See supra* notes 16-17 and accompanying text.

124. Branzburg v. Hayes, 408 U.S. at 708-09; *see supra* note 17 and accompanying text.

125. *Branzburg*, 408 U.S. at 667. Justice White, writing for the Court, narrowed the holding stating: "The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." *Id.*

126. *Id.* at 709-10 (Powell, J., concurring).

127. *Id.* at 743 (Stewart, J., dissenting). Justice Douglas dissented separately but did not develop a standard of review. *Id.* at 711 (Douglas, J., dissenting). A number of courts have interpreted the plurality opinion in *Branzburg* as creating a reporter's privilege. *See, e.g.*, Silkwood v. Kerr-McGee, 563 F.2d 433 (10th Cir. 1977), *rev'd*, 464 U.S. 238 (1984); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1972), *cert. denied* 417 U.S. 938 (1973); and Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

128. The Justices, of course, were limited to a criminal setting by the facts of the cases. *See Branzburg*, 408 U.S. at 668-80.

129. *Id.* at 696.

130. *Id.* at 681.

131. *Id.* at 682.

132. *See supra* notes 124-26 and accompanying text.

individual brings the action to seek redress for damage to his reputation.[133] Society's interest would seem to demand source protection to promote the free flow of information.[134] Libel cases, therefore, require a different balance of equities than that undertaken in *Branzburg*.

Herbert is also distinguishable because the privilege claimed in that case was not a reporter's privilege, but rather a privilege for the editorial process.[135] The distinction between the two is found in the type of information that may be affected. The editorial privilege does not concern actual information disseminated.[136] It concerns the discussion and thoughts of the editors and reporters when deciding whether to disseminate information.[137] The reporter's privilege, in contrast, involves information obtained during newsgathering for the purpose of dissemination.[138]

Neither *Branzburg* nor *Herbert* address the issue of whether the identity of confidential sources should be protected in a libel setting. This section, therefore, will examine methods developed by lower courts to decide this issue, and will develop a conclusion regarding whether confidential source protection should be offered in news media libel cases.

B. Methods of Deciding Libel Discovery Cases Involving Confidential Sources

Since *Branzburg*, courts have dealt with the question of whether a defendant reporter should be compelled to disclose the identity of confidential sources in libel cases. This section will discuss various standards that have been developed.

1. No Privilege Upon a Showing of a Genuine Issue of Fact Regarding the Falsity of Publication.—Several courts have adopted standards that require a minimal showing to compel disclosure.[139]

133. *Herbert*, 441 U.S. at 169.
134. *Mitchell*, 37 Cal.3d at ____, 690 P.2d at 628, 208 Cal. Rptr. at 155.
135. *Herbert*, 441 U.S. at 155.
136. *Id.* at 181 (Brennan, J., dissenting).
137. *Id.*
138. *Mitchell*, 37 Cal.3d at ____, 690 P.2d at 631, 208 Cal. Rptr. at 158.
139. *See* Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (holding that relevance provides sufficient protection of confidential sources); Sierra Life Ins. v. Magic Valley Newspapers, 101 Idaho 795, 623 P.2d 103 (1980) (following *Herbert* in requiring a mere showing of relevance to gain access to the identity of confidential sources); Gagnon v. Dist. Court In & For City of Fremont, ____ Colo. ____, 632 P.2d 567 (1981) (holding that a demonstration of relevance is sufficient to order disclosure of identity of confidential source); and Georgia Communications Corp. v. Horne, 164 Ga. App. 227, 294 S.E.2d 725 (1982) (holding, under *Branzburg*, that no constitutional privilege exists). Reliance on *Herbert* for the proposition that the Constitution does not provide a reporter's privilege is misplaced, because the *Herbert* opinion does not address a confidential source question. *Herbert*, 441 U.S. at 181 (Brennan, J., dissenting). *See also supra* notes 135-38 and accompanying text. Reliance on

The standard developed by the New Hampshire Supreme Court in *Downing v. Monitor Publishing*[140] is representative of these. In *Downing*, the court held that the identity of a confidential source must be disclosed after plaintiff has made an offer of proof that a genuine issue of fact regarding falsity exists.[141] The court reasoned that the United States Supreme Court had provided sufficient protection for the press in *New York Times v. Sullivan.*[142] Additional press protection would place too much of a burden on plaintiffs, the court said, citing *Herbert.*[143]

But the court's reliance on *Herbert* is misplaced because the court failed to distinguish the editorial privilege operating in *Herbert* from the reporter's privilege in *Downing*. The *Herbert* decision was grounded on what the Court found to be the necessary examination of thoughts and discussion during the editorial process.[144] In libel cases, the identity of a source may have only a tangential relationship to the case. In addition, alternative sources of information may be available.

Although the *Downing* court rejected the creation of a privilege, it claims to offer "some safeguard . . . to prevent an order of disclosure".[145] But the safeguard is tenuous at best, because the court will assess the claim's legitimacy but will not require some demonstration of a need to obtain information.[146] The *Downing* approach therefore permits any plaintiff able to make an offer of proof that a genuine issue of falsity exists to seek the identity of a confidential source.[147] Under such a rule, a potential source who wishes to remain anonymous will think twice before disclosing information to a reporter.

2. Information must go to the Heart of the Issue.—In *Mize v. McGraw Hill*,[148] a United States district court held that a plaintiff must prove that the information sought goes to the heart of the claim before disclosure will be compelled.[149] To meet that burden,

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Branzburg is also misplaced, because that decision did not involve a libel case, but rather grand jury proceedings. *See supra* notes 133-34 and accompanying text.

140. 120 N.H. 383, 415 A.2d 683 (1980).

141. Downing v. Monitor Publishing, 120 N.H. at 387, 415 A.2d at 686.

142. *Downing*, 120 N.H. at 385-86, 415 A.2d at 685; *see supra* notes 37-39 and accompanying text for an examination of *New York Times Co. v. Sullivan.*

143. *Downing*, 120 N.H. at 386-87, 415 A.2d at 685-86.

144. *See supra* notes 135-38 and accompanying text.

145. *Downing*, 120 N.H. at 387, 415 A.2d at 686.

146. In this area, *Downing* differs from cases requiring only a demonstration of relevancy. *See supra* note 139 and accompanying text. The relevance requirement focuses on the need for the information, yet fails to examine whether the claim is meritorious.

147. *Downing*, 120 N.H. at 387, 415 A.2d at 686.

148. 82 F.R.D. 475 (S.D. Tex. 1979).

149. *Mize*, 82 F.R.D. at 477; *see* Liberty Lobby Inc. v. Anderson, 96 F.R.D. 10 (D.D.C. 1982); Application of Dack, 101 Misc. 2d 490, 421 N.Y.S.2d 775 (Sup. Ct. Monroe Co.

the plaintiff must prove that his case will be cognizably prejudiced if the information is not disclosed.[150] The court said that "mere speculation or conjecture about the fruits of such examination simply will not suffice"[151] and stated that the "heart of the claim" standard properly balanced the interests of all parties involved. It protects the interests of news organizations and the public by providing a level of protection for confidential information, while allowing plaintiffs to have access to information central to their cases.[152]

In recognizing the importance of confidential sources to the dissemination of information, the heart of the issue approach differs from the genuine issue of falsity standard, which merely screens out non-meritorious claims.[153] The genuine issue standard provides no protection for confidential sources involved in meritorious claims that are only tangentially related to the case.[154]

But the heart of the issue standard is not flawless. The balancing approach places the private interest in gaining information on the same plane as the public interest, and fails to account for occasions where the public may have an overriding interest in protecting confidentiality.[155] In other words, the approach assumes the public interest in confidentiality and overrides it when the private interest reaches a prejudicial level. The approach fails to evaluate the public interest in each specific circumstance to determine if, regardless of the prejudicial impact on plaintiff's case, the public interest in nondisclosure should prevail. The standard, therefore, may not be as flexible as it appears. But there are other standards available for those jurisdictions seeking to provide strong protection for the public interest.

3. The Three-Part Test.—A number of jurisdictions have adopted a three-part test for confidential source disclosure.[156] Although the precise test varies from jurisdiction to jurisdiction, most tests are similar to the test that the Fifth Circuit adopted in *Miller*

1979). A number of courts have interpreted state shield laws to provide protection unless the information goes to the heart of the claim. *See* Taylor v. Miskovsky, 7 Media L. Rep. 2408 (Okla. 1981); Aerial Burials v. Minneapolis Star and Tribune, 8 Media L. Rep. 1653 (4th Dist. D.C. Minn. 1982); and Weiss v. Thomson Newspapers, 8 Media L. Rep. 1258 (D.C. Licking Co. Ohio 1981).

150. *Mize*, 82 F.R.D. at 477.

151. *Id.* (quoting Cervantes v. Time, Inc., 464 F.2d 986, 994 (8th Cir. 1972)).

152. *Mize*, 82 F.R.D. at 477.

153. *See supra* note 146 and accompanying text.

154. *See supra* note 153.

155. *See Mitchell*, 37 Cal.3d at ____, 690 P.2d at 634, 208 Cal. Rptr. at 161.

156. *See* In re Selcraig, 705 F.2d 789 (5th Cir. 1983); Semlich v. Herald Co., No. 84-281C(5) (E.D. Mo. 1985); Continental Cablevision, Inc. v. Storer Broadcasting, 583 F. Supp. 427 (E.D. Mo. 1984); Dowd v. Calabrese, 577 F. Supp. 238 (D.D.C. 1983); Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. Dist. Ct. App. 1983); and Resorts Int'l v. NJM Assoc.s, 180 N.J. Super. 459, 435 A.2d 572 (1981).

v. Trans American.[157] In *Trans American*, the court held that before confidential source disclosure could be compelled, a plaintiff must prove by substantial evidence: 1) that the challenged statement was published and is both factually untrue and defamatory; 2) that reasonable efforts to discover the information from alternative sources have been made and that no reasonable source is available; and 3) that knowledge of the informant's identity is necessary to the proper preparation of the case.[158]

The protection the *Trans American* test provides is comprehensive, focusing on both the claim's merit and the need for the information. The first part of the test requires the plaintiff to demonstrate that his claim is meritorious.[159] The court has provided an effective obstacle to plaintiffs filing libel suits merely to discover the identity of a confidential source. If there is no reputational damage, there is no access to confidential sources via the discovery process. Further protection is provided by the requirement that the demonstration be made by substantive evidence. A mere statement by the plaintiff that the published information is untrue and defamatory will not suffice.[160]

The second part of the test evaluates the potential sources of information available to the plaintiff. Plaintiff must attempt to discover the information from alternative sources through reasonable efforts.[161] If there is another available source of information, the plaintiff's interest will be served without disrupting the public interest in protecting the confidentiality of sources.[162] If there is no alter-

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157. 621 F.2d 721 (5th Cir. 1980), *modified*, 628 F.2d 932 (5th Cir. 1980).

158. *Miller*, 628 F.2d at 932. Originally, the court stated the three-part test as: 1) Is the information relevant to the case?; 2) Have alternative sources been exhausted?; and 3) Is there a compelling interest in the information? *Miller*, 621 F.2d at 726. The court did not explain the change.

159. The examination of the merit of the claim is the most important change in the test as initially formulated by the court. Originally, the court required a showing of relevance. *Miller*, 621 F.2d at 726. But relevance has nothing to do with the merit of a claim, since information may be relevant to a claim even if the claim itself is meritless. The original test, therefore, provided no protection against meritless claims. Similarly, three courts adopting three-part tests have failed to provide protection against meritless claims. *See* Semlich v. Herald Co., No. 84-281C(5) (E.D. Mo. 1985); Continental Cablevision, Inc. v. Storer Broadcasting, 583 F. Supp. 427 (E.D. Mo. 1984); Resorts Int'l v. NJM Assoc.s, 180 N.J. Super. 459, 435 A.2d 572 (1981). One court provides minimal protection requiring that a claim not be frivolous, *Dowd*, 577 F. Supp. at 241 n.7, while two courts strictly follow the Trans American test. In re Selcraig, 705 F.2d 789 (5th Cir. 1983), and Gadsden County Times Inc. v. Horne, 426 So.2d 1234 (Fla. Dist. Ct. App. 1983).

160. *Miller*, 628 F.2d at 932. The defamatory and untrue nature of the article must be demonstrated by substantial evidence. *Id.*

161. *Id.* Every court adopting a three-part test includes an alternative source component. *See supra* note 156.

162. *See Branzburg*, 408 U.S. at 745 (Stewart, J., dissenting). As Justice Stewart wrote:

> It is an obvious but important truism that when government aims have been fully served, there can be no legitimate reason to disrupt a confidential relationship between a reporter and his source. To do so would not aid the administra-

native source, and a plaintiff can meet the other parts of the test, the plaintiff is permitted to discover the source's identity.[163]

In the third part of the test, the plaintiff must prove that knowledge of the informant's identity is essential to the proper preparation of the case.[164] Although the court does not define necessary or proper preparation,[165] the definition probably turns on whether lack of access to the source's identity would preclude the demonstration of a prima facie case.[166] Information would neither be necessary, nor would proper preparation be threatened, if denial of disclosure would not foreclose the chances of the plaintiff proving his claim.

The three-part *Trans American* test provides greater protection than the previous two tests examined. The first part of the test alone provides greater protection than the factual issue of falsity test.[167] Part one of the *Trans American* test requires not only an offer of proof of a factual issue of falsity, but a demonstration through substantial evidence of publication of a statement that is both factually untrue and defamatory.[168] Mere speculation through an offer of proof would not suffice.

The second and third parts of the *Trans American* test provide more protection than the heart of the claim standard.[169] While some courts require a proof of exhaustion of alternative sources before considering the heart of the claim issue,[170] most do not require a high degree of need in order for plaintiffs to obtain confidential information.[171] The heart of the claim test eliminates the ability to discover a confidential source's identity with regard to tangential issues,[172] though information relevant to the central issue is discoverable.[173] The third part of the *Trans American* test, however, requires

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> tion of justice and would only impair the flow of information to the public. Thus, it is to avoid deterrence of such sources that I think the government must show that there are no alternative means for the grand jury to obtain the information sought.

Id. Justice Stewart's rationale is even more forceful in libel cases where the government is not a party to the action and the only societal interest involved is the dissemination of information.

163. *Miller*, 628 F.2d at 932.

164. *Id.* Originally, the third part of the test was whether there is a compelling interest in obtaining the information. *Miller*, 621 F.2d at 726. Although the modified opinion is clearer, the application of the third part of the test is the same, since any litigant has a compelling interest in information if the denial of access would inhibit proper preparation necessary to prove his case.

165. *See Miller*, 628 F.2d at 932.

166. *See Mize*, 82 F.R.D. at 478.

167. *See supra* notes 139-47 and accompanying text.

168. *Miller*, 628 F.2d at 932.

169. *See supra* notes 148-55 and accompanying text.

170. *See Mize*, 82 F.R.D. at 477.

171. *See* Application of Dack, 101 Misc.2d 490, 500, 421 N.Y.S. 775, 782 (Sup. Ct. Monroe Co. 1979).

172. *See supra* note 152 and accompanying text.

173. *See Mitchell*, 37 Cal.3d at ____, 690 P.2d at 632, 208 Cal. Rptr. at 159.

demonstration of necessity; prejudice alone is not enough.[174] The test requires that the source's identity be withheld unless preventing disclosure would preclude plaintiff's claim.

As with the heart of the issue standard, it appears that the *Trans American* test is to be applied mechanically. It establishes a test to protect the public interest and provides a system for the individual plaintiff to overcome that interest, but fails to reexamine the public interest once the plaintiff has met the required burden. As a result, the public interest may be subordinated to the private interest, even if the public interest is superior.

4. The California Approach.—In 1984, the California Supreme Court adopted the most comprehensive test for protecting the identity of confidential sources short of providing an absolute privilege. In *Mitchell v. Superior Court*,[175] the court adopted a five-part test to determine whether confidential information or sources should be disclosed.[176] To compel disclosure, California courts must consider: 1) whether the reporter is a party to the litigation; 2) whether the information goes to the heart of the claim; 3) whether alternative sources have been exhausted; 4) whether the public interest overrides the private interest in disclosure; and 5) whether the plaintiffs have made a prima facie showing of defamatory falsehood.[177]

Two parts of the California test — alternative sources and heart of the claim provisions — have been previously examined.[178] The California court has said the first part of the test defines the scope of the privilege.[179] Disclosure is more appropriate if a reporter or news organization is a party to the litigation,[180] and especially if the party reporter has confidential information that will effectively prevent a finding of liability.[181] According to the court, actual malice cases are particularly appropriate for disclosure if a plaintiff must show recklessness,[182] because, to prove recklessness, a plaintiff may have to show a source was unreliable.[183] To demonstrate lack of reliability, the plaintiff may need to know the identity of the source.[184] Disclosure, therefore, might be appropriate since plaintiff's case may other-

174. *See supra* notes 164-66 and accompanying text.
175. 37 Cal.3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984).
176. *Mitchell*, 37 Cal.3d at ____, 690 P.2d at 632-35, 208 Cal. Rptr. at 159-62.
177. *Id.*
178. *See supra* notes 148-55 and 161-63 and accompanying text.
179. *Mitchell*, 37 Cal.3d at ____, 690 P.2d at 632, 208 Cal. Rptr. at 159.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

wise be jeopardized.[185] But the court notes that demonstration of potential need is not enough.[186] Other interests must be balanced before a decision can be made.

One of those interests is preventing non-meritorious claims.[187] The *Mitchell* test requires plaintiffs to make a prima facie showing that the statements at the root of the claim are defamatory and false.[188] The California approach also requires courts to consider the importance of the public interest involved *after* the plaintiff has met the requirements demonstrating need.[189] If compelling disclosure inhibits the future disclosure of information that is of significant importance to the public, the public interest may override the private interest *even if the plaintiff's claim is precluded.*[190] The California approach, therefore, departs from the mechanical nature of other approaches since it requires ad hoc balancing in every case, instead of strict application of a test.[191] The flexibility of the California approach sets it apart from other standards of review.

IV. Penalties for Failure to Disclose Information

Even when judges order news organizations to disclose information or cooperate in discovery procedures, some refuse to do so. In those situations, courts attempt to craft remedies designed to either encourage disclosure or preclude those violating discovery orders from profiting from the information they refuse to disclose.[192] Although some courts hold reporters in contempt of court and order incarceration for refusal to comply with discovery orders,[193] incarceration is often ineffective because many journalists are willing to go to jail rather than divulge information.[194] Usually, libel proceedings

185. *Id.*

186. *Id.*

187. *See supra* notes 20-26 and 29-30 and accompanying text for an examination of the problems involved when discovery is permitted when a libel claim lacks merit.

188. *Mitchell*, 37 Cal.3d at ____, 690 P.2d at 634, 208 Cal. Rptr. at 161. The court states that there is a great public interest in the truthful revelation of wrongdoing and in protecting the whistleblower from retaliation, but there is very little public interest in protecting the source of false accusations of wrongdoing. *Id.* The court, however, qualifies the language, stating that "[a] showing of falsity is not a prerequisite to discovery, but it may be essential to tip the balance in favor of discovery." *Id.* But the court does not say in what circumstances falsity must be demonstrated to tip the balance.

189. *Id.*

190. *Id.*

191. *See supra* note 155 and accompanying text.

192. *See* Sierra Life Ins. v. Magic Valley Newspapers, 101 Idaho 795, 799, 623 P.2d 103, 107 (1980).

193. *See* Costello v. Capital Cities Media, Inc., No. 81-L-10 (Cir. Ct. St. Clair County, Ill. May 23, 1984), *applic. denied* Hargraves v. Scrivner, 52 U.S.L.W. 3928, (U.S. July 2, 1984) (No. A-1027).

194. *See Downing*, 415 A.2d at 686. The court said that sending a journalist to jail in no way helps the plaintiff to prove his case: "Although we do not say that the contempt power should not be exercised, we do say that something more is required to protect the rights of a

provide judges with alternatives to incarceration since the reporter or news organization is a party to the suit.[195] This section will review those alternatives and suggest which alternative is an appropriate remedy to impose.

A. Entering Default Judgment

Perhaps the harshest alternative to incarceration is entering a default judgment against the news organization. In *Georgia Communications v. Horne*,[196] a Georgia intermediate appellate court, citing state statutory law,[197] upheld a trial court's default judgment entered after a reporter would not comply with an order to disclose the identity of a confidential source.[198] The reporter argued that the default judgment was excessive punishment for a good-faith attempt to exercise a constitutional right.[199] The court rejected the argument, stating that the reporter intentionally sought a confrontation with the court and disobeyed its orders.[200]

But the default judgment remedy has been criticized as a violation of due process.[201] In *Hovey v. Elliott*,[202] the United States Supreme Court held that the imposition of a default judgment for failure to obey an order to produce evidence could constitute a denial of due process.[203] In addition, the failure to produce evidence may only be an admission of the lack of merit of a single defense.[204] There may be several other defenses available to a party that should not be foreclosed.[205] Entering a default judgment precludes a party from offering those defenses and accordingly may violate due process.

In considering whether a default judgment is an appropriate sanction, courts should be mindful of the purpose of sanctions. They may be appropriate for the purpose of insuring that a defendant does not profit from his refusal to provide information.[206] But sanctions are not appropriate punishment for contempt.[207] If alternative de-

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libel plaintiff." *Id.*

195. Judges have few options other than contempt when a journalist is not a party to the proceedings, since the journalist has no apparent stake in the outcome of the proceedings.

196. 164 Ga. App. 227, 294 S.E.2d 725 (1982).

197. GA. CODE ANN. § 81A-137(b)(2)(c) (1962).

198. *Georgia Communications*, 164 Ga. App. at ____, 294 S.E.2d at 726.

199. *Id.*

200. *Id.*

201. *Sierra Life*, 101 Idaho at 799, 623 P.2d at 107-08.

202. 167 U.S. 409 (1897).

203. *Hovey*, 167 U.S. at 415.

204. Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909).

205. This is particularly true in a libel case where, for example, there may be questions of whether the statement was published, was actually defamatory, or concerned the plaintiff.

206. *Sierra Life*, 101 Idaho at 799, 623 P.2d at 107.

207. *Id.* It is clear that the Georgia court in *Georgia Communications* used sanctions as punishment. The trial court gave two reasons for striking the pleadings. First,

> the violation committed was willful, conscious, deliberate, flagrant and truculent.

fenses, unrelated to the allegedly privileged information, are available, then default judgment is probably in violation of due process.

B. The No Source Presumption

An alternative which more directly addresses the issue is the declaration that no source exists when a news organization refuses to comply with a discovery order.[208] A "no source presumption" precludes a news organization from profiting from its refusal to comply[209] since under the no source rule, a news organization cannot use any evidence gathered from that source to prove that the published story was accurate.[210] At the same time, the no source presumption allows a news organization to assert other defenses and privileges.

But the problem with the no source presumption is that it removes the decision-making function from the finder of fact. A news organization cannot place its reporter on the stand to testify that the information was gathered from a confidential source. The jury, in turn, cannot decide whether the journalist is telling the truth.

The rule may also raise a presumption that may not be true. If the news organization, in fact, has a source, the no source presumption places the court in a position of telling the jury something that is not accurate. If opposing counsel suspects that the reporter may be lying when he states that he has a source, counsel can place that reporter on the stand and ask him to state, under oath, whether a source exists. This traditional protection against false testimony provides the proper remedy for refusal to comply with a discovery order.

C. Precluding the Introduction of Evidence Gathered from the Source

A third alternative to incarceration is for a judge to prohibit the introduction of evidence gathered from an unidentified confidential source.[211] Under this method, a reporter may testify that information was gathered from a confidential source.[212] The jury may evaluate

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> Mr. Williams appeared to desire a confrontation with the court and, by his own testimony, had long before the hearing made the decision not to obey the court's order . . . . Secondly, defendant . . . stated that he would never obey the order of the court . . . .

Georgia Communications, 164 Ga. App. at ____, 294 S.E.2d at 726.

208. *Downing*, 120 N.H. at 387, 415 A.2d at 686; *see* DeRoburt v. Gannett Co., 507 F. Supp. 880 (D. Hawaii 1981).

209. The *Downing* court phrased the interest differently, stating that the rights of the libel plaintiff would be protected. *Downing*, 120 N.H. at 387, 415 A.2d at 686.

210. *Id.*

211. Greenberg v. CBS, 69 A.D.2d 693, 708-09, 419 N.Y.S.2d 988, 997 (App. Div. 2d Dept. 1979).

212. *Id.*

whether or not the reporter is telling the truth. But the news organization may not introduce any evidence obtained from that source.[213] Therefore, the news organization does not profit from its refusal to obey an order to disclose. The jury, however, is told of the circumstances under which certain information was gathered and can decide whether the circumstances were reliable or credible.

D. Balancing Competing Interests

Two competing and compelling interests are involved in deciding what type of action to take when a news organization or reporter refuses to disclose the identity of a confidential source. Should a news organization be permitted to use information from a source it refuses to disclose and to which the plaintiff has no access? Should the finder of fact be denied access to information that is both relevant and true?

The standard that best balances these interests precludes the admission of evidence gathered from a source, but allows a reporter to testify that he indeed has a source. The standard protects plaintiffs from a defendant's use of evidence gathered from a source plaintiffs cannot evaluate. Yet, it allows facts tending to prove that the information was not fabricated to be placed before the trier of fact. The trier of fact may then make an independent assessment of the veracity of the reporter's testimony and may either conclude that a confidential source existed, or that there was no source.

V. Conclusion

This article has examined whether non-confidential, non-published information and the identity of confidential sources should be discoverable in a media libel case. Three conclusions can be drawn.

First, non-confidential, non-published information should never be discoverable unless the plaintiff has shown, at a minimum, that the claim has merit, that the information sought goes to the heart of the claim, and that reasonable alternative sources have been exhausted. This test sufficiently balances the public interest in access to information, facilitated by source nondisclosure, against the private interest of having access to information to prove a claim.

Second, the identity of confidential sources should be discoverable only if the plaintiff has shown that the reporter is a party to the action, that the information goes to the heart of the claim, that alternative sources have been exhausted, that the published statements were defamatory and untrue, and that the private need for disclosure

213. *Id.*

exceeds the public interest in confidentiality. This test also strikes a balance between the public interest in access to information provided by confidential sources and the private interest in access to information to prove a libel claim.

Third, if a defendant news organization fails to comply with a discovery order to provide information sought by a libel plaintiff, the court should allow testimony that information was provided by a confidential source, but may prohibit the admission of evidence provided by the source. This remedy prevents a news organization from profiting from its refusal to obey the court, yet allows it to assert other defenses. It permits the trier of fact to perform its traditional duty of determining the credibility of witnesses and decreases the probability that inaccurate information, in the form of a false presumption, will be placed before the jury.